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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1857

ALCOA STEAMSHIP COMPANY, INC.,
Petitioner,

- against -

M/V NORDIC REGENT, her boilers, tackle, machinery and other appurtenances *in rem* and NORCROSS SHIPPING CO., INC., as her owner *in personam,*
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent.

BRIEF IN OPPOSITION TO THE PETITION OF ALCOA STEAMSHIP CO., INC. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent respectfully requests that this Court deny the petition for writ of certiorari to review the *en banc* decision of the United States Court of Appeals for the Second Circuit dated February 25, 1980, vacating the judgment and opinion of the panel on rehearing dated January 10, 1979. The panel on rehearing had reversed the judgment and opinion of the same panel dated August 31, 1978. The *en banc* decision affirmed the judgment of the United States District Court for the Southern District of New York dated January 17, 1978, conditionally dismissing this admiralty suit under the doctrine of *forum non conveniens.*

Questions Presented

1. Does the standard established by this Court in *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947) for determining

motions to dismiss on *forum non conveniens* grounds apply to all litigants?

2. Did the district court err in granting the motion to dismiss on *forum non conveniens* grounds knowing that petitioner, if successful in the alternative forum, would recover less than the $3.5 million maximum recovery from any limitation fund available in the United States?

Statutes Involved

Involved in this case are art. III § 2, cl. 1 (The "arising under" and Admiralty Clauses) of the Constitution of the United States, and 46 U.S.C. § 183(a) (The Limitation of Shipowners' Liability Statutes), which are printed in Petition, Appendix A.

Statement of the Case

a. The Facts.

This action to recover for property damages arises from the allision on January 2, 1977 of the M/V NORDIC REGENT (the vessel) with a transfer station ore pier owned and operated by petitioner, Alcoa Steamship Company, Inc. (Alcoa) and located in Port Tembladora, Trinidad, West Indies. Petitioner has conducted business at the ore transfer terminal in Trinidad for over 25 years. The vessel was owned by respondent Norcross Shipping Co., Inc. (Norcross) a Liberian corporation, and was manned by Italian officers and crew.

On the day of the accident, the M/V NORDIC REGENT was invited by the Trinidadian Pilots' Association to proceed to a point one-half to one mile from the pier, and was also advised that a pilot would be waiting. No pilot was there when the vessel arrived. Shortly before entering this zone of invitation, according to the captain, the vessel en-

countered a current driving against her starboard side; the pilot assigned to handle the vessel, in his statement, characterized these local phenomena as "surface and subsurface currents." The captain tried to maneuver without success, and the vessel struck the pier.

At the time of the allision, the vessel's owner, respondent Norcross had chartered the vessel to Anglo-Nordic Shipping Co., Ltd. which, in turn, had chartered it to petitioner Alcoa. Since no dispute arose under either of the charter-parties as a result of the accident of January 2, 1977, the language and clauses of the contracts are irrelevant to the issue at bar.

b. Litigation History

Petitioner commenced the instant admiralty action in the United States District Court for the Southern District of New York to recover for property damage to its pier in Trinidad, allegedly resulting from the negligence of the vessel and its captain. Petitioner named as defendants the M/V NORDIC REGENT and its owner Norcross, and served process on its agent in New York.

Shortly after the accident, respondent commenced a limitation proceeding in Trinidad which establishes its presence there for purposes of suit by petitioner. Additionally, respondent has given a letter of guarantee to petitioner that a Trinidadian judgment would be satisfied and agreed that this could be made a condition for the dismissal of the action, as the district court subsequently so ordered.

On February 4, 1977 respondent moved to dismiss the action under the doctrine of *forum non conveniens*. After taking the motion to dismiss on submission based on the pleadings, affidavits, briefs and letters of the parties, the district court conditionally granted the motion on January 17, 1978.

On August 31, 1978 the United States Court of Appeals for the Second Circuit affirmed the district court in a 2 to 1 opinion. Upon rehearing, the same panel—with one judge changing his vote—withdrew the original panel's affirmance and reversed the district court. Upon rehearing *en banc* directed to the second panel decision, the United States Court of Appeals for the Second Circuit vacated the judgment and opinion of the panel on rehearing and affirmed by a 7 to 2 vote[1] the judgment of the district court in an opinion dated February 25, 1980.

Reason for Denying the Writ

The Court of Appeals for the Second Circuit *en banc* properly affirmed the district court's sound exercise of discretion in dismissing the case after applying the test established by this court in *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947), for determining motions to dismiss on grounds of *forum non conveniens.* In so deciding the *en banc* court reaffirmed the applicability of the *Gilbert* criteria, which has been established law for more than three decades. After finding ample justification for the district court's discretionary dismissal under the *Gilbert* test, the *en banc* majority rejected the claim of petitioner that in the circumstances of this case a different standard ought apply. It was unsucessfully urged that because petitioner, part of a multinational business enterprise is incorporated in New York and, hence, is an American citizen, its choice of forum should not be disturbed, despite the fact that this litigation, which involved claim of damage to no doubt well insured property, arises from a perhaps ultimately inevitable accident occurring in the 25 year continuous course of operation

1. Judge Gurfein, who was a member of the *en banc* court, unfortunately died on December 16, 1979. Prior to his death, he had voted to affirm the judgment of the district court. He did not have the opportunity, however, to see the *en banc* court's opinion prior to his death. (Petition A-3).

by this American corporation of an "offshore" facility. There is before this court no issue of the district court's abuse of the discretion accorded it under *Gilbert.* There is, further, no serious argument made by petitioner that the Southern District of New York is a *convenient* forum for this purely local matter, or that to a degree or other respondent will not be disadvantaged by a trial in petitioner's chosen forum. Having, on the basis of the record in the district court, lost as it were "fair and square" under the *Gilbert* criteria, this disappointed petitioner plunges on, urging this court to forge what is unquestionably a new rule of law whereby an American plaintiff will be all but immune from a motion to dismiss on grounds of *forum non conveniens.* That is to say, petitioner urges that a degree of injustice should properly be inflicted upon a defendant, or that, at minimum, he should be required to bear all manner of inconvenience, and be no less than heavily burdened if not oppressed, should that result happen to suit the interest of an American plaintiff. Thus, according to petitioner, no matter how local the controversy or remote from the American forum the defendant, or how permanently international the nature of the enterprise, and apart from considerations of convenience or concern for the equality of a foreign defendant's rights, an American plaintiff in cases of this sort should be allowed a virtually unlimited right to embrace, when advantageous, a *part of* the laws of the United States, 46 U.S.C. § 183(a), regarding maritime limitations of liability. And if this court cannot, or will not, adopt this parochial and discriminatory view, petitioiner then implores the Court to hold dismissal on *forum non conveniens* grounds inappropriate when recovery in the alternative forum is markedly less than that provided by the forum chosen, in order, of course, to achieve precisely that more favorable result.

Surely petitioner would have the court ignore the underlying facts: (1) when the ore transfer station was con-

structed more than one quarter of a century ago, in an apparent expression of a deliberate choice by petitioner to forego the "advantages" of American law with respect, for example, to taxes and labor, Alcoa knew, or should have known, that if the pier were struck and damaged by a vessel the owner could, under the law of Trinidad, raise as a defense a limitation of liability statute less favorable on certain facts than that provided by the laws of the United States. Alcoa was at the time of the decision to shelter this aspect of its far-flung business operations under the laws of Trinidad, aware that limitation statutes are arbitrary, and hence never unfair, and are, purely and simply, expressions of a public policy to which this petitioner was no doubt all too exquisitely attuned with respect to other aspects of its Trinidad operation. This multinational corporation must surely have considered, before embarking on this offshore profit maximizing enterprise, the possibility of litigation of this kind in Trinidad, along with such other factors as the apparent advantage gained by the, perhaps, more favorable tax and labor laws.

The exquisitely drawn criteria set forth in the landmark case of *Gulf Oil* v. *Gilbert,* indeed, mark it as a case for all plaintiffs whose choice of forum is challenged. Save for differing amounts of recovery, which if considered would render the doctrine of *forum non conveniens* impotent, all of the arguments raised in this petition and possibly all previous petitions are met, including the question of whether defendant was vexed and harassed by plaintiff's forum selection. A plaintiff can demand no more than that the judge fairly consider all the factors in exercising his discretion.

We can do no better now than to turn to the language of the district court, which gave rise to the controversy before this Court:

> This Court is persuaded that the lack of a substantial nexus between this controversy and the

Southern District of New York combined with the inconvenience and possible prejudice to the defendant resulting from retention of jurisdiction here—which substantially outweigh any inconvenience plaintiff may suffer—renders this an inappropriate forum; an evaluation of the contentions of the parties compels the conclusion that the litigation of this case can be conducted most expeditously and inexpensively in Trinidad.

* * *

Nor does plaintiff's asserted interest in the convenience of its expert witnesses weigh heavily, since they will have to travel some distance to trial regardless of its location. This is also true, of course, with respect to witnesses from the crew of the M/V Nordic Regent. On the whole, however, the availability and convenience of the witnesses militates most strongly toward dismissal in this case. The dock workers, pilot personnel and repair witnesses are concededly residents of Trinidad. As recognized by this Court in *Gulf Oil* v. *Gilibert, supra* at 511, 67 S.Ct. at 844,

> [T]o fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants. Nor is it necessarily cured by the statements of plaintiff's counsel that he will see to getting many of the witnesses to the trial * * *.

Most importantly, the inability to implead the pilot association here, which is not challenged by plaintiff, may seriously prejudice the defendant. The inability to implead other parties directly involved has been recognized as a factor to be weighed against retention of jurisdiction, . . .

* * *

These factors substantially outweigh plaintiff's choice of forum—even though plaintiff correctly argues that courts are more reluctant to deprive a plaintiff of that choice where dismissal would force

> an American citizen to seek redress in a foreign court. An American citizen does not, however, enjoy an absolute right to sue in an American court. [Petition A-76-78]

This Court therefore should deny the petition for writ of certiorari, and leave undisturbed the consistent line of decisions by the lower courts which reflect the appropriateness of the *Gilbert* standard.

POINT I

THE *GILBERT* CRITERIA GIVE DUE CONSIDERATION TO PLAINTIFF'S EXPRESSED PREFERENCE OF FORUM AND ARE BROAD ENOUGH TO INSURE A JUST RESULT IN ALL *FORUM NON CONVENIENS* CASES IRRESPECTIVE OF THE CITIZENSHIP OF THE PARTIES.

In *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 507 (1947), this Court approved the inherent authority of federal courts to decline to exercise jurisdiction under the doctrine of *forum non conveniens* where the litigation could more appropriately proceed in a foreign tribunal. In so doing, this Court recognized that an alternative forum can, at times, maximize the ends of justice and better serve the convenience of all concerned by ensuring that the controversy proceeds in the forum that has the best and most convient access to the sources of proof.

The factors enumerated by Mr. Justice Jackson in writing for the majority in *Gilbert* to be considered by courts in their determination can be divided into two categories; the interests of the litigants and the interests of the public. The interests of the litigants include the relative ease of access to sources of proof; the availability of compulsory process for the attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses; the possibility of a view of the premises, if a view would be appro-

priate to the action; questions as to the enforeability of a judgment; relative advantages and obstacles to a fair trial; and all other practical problems that make trial of a case easy, expeditious and inexpensive. The interests of the public include, administrative difficulties stemming from court congestion; a local interest in having localized controversies decided at home; and avoidance of unnecessary problems in conflicts of laws and in law foreign to the forum.[2]

Regarding plaintiff's choice of forum, the majority stated:

> It is often said that the plaintiff may not, by choice of an inconvenient forum "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. *Id.* at 508.

Of necessity, application of the *Gilbert* standard leaves a great deal to the discretion of the trial courts who must weigh the facts and circumstances of each case in balancing the convenience of the parties, Restatement (Second) of Conflicts of Laws § 84, Comment b (1971), a fact recognized and approved by this court in *Gilbert:*

> Wisely it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses. 330 U.S. at 508 (footnote omitted). [Petition A-27].

By declining to define an "all purpose rule" and instead, setting forth the relevant factors to be taken into account

2. *Id.* at 507-508. The Court is also respectfully referred to the opinion of the district court in the Memorandum and Order of Judge Conner, January 17, 1978 (Petition A-74).

by the trial court in exercising its discretion, factors which may vary from case to case but are nevertheless always present be it 1947 or 1980, this Court ensured the continuing vitality of the *Gilbert* standard; a standard which the federal courts have reaffirmed repeatedly.[3]

The reason for the longevity of the *Gilbert* standard and its subsequent expansive application by the state courts, most notably in New York,[4] as well as the reliance placed upon it by Congress in codifying the doctrine of *forum non conveniens* in 28 U.S.C. §1404(a), the transfer statute, is readily apparent; it requires, and indeed, "nicely blends", considerations of harassment by the parties with a balancing of conveniences. Braucher, *The Inconvenient Federal Forum,* 60 Harv. L. Rev. 908, 923 (1947). In so doing the *Gilbert* standard fulfills the principle function of the doctrine of *forum non conveniens,* the avoidance of forum shopping.[5] As this Court realistically recognized in a comment

3. The Court is respectfully referred to the opinion *en banc* of the Second Circuit (Petition A-28). *See also, Farmanfarmaian* v. *Gulf Oil Corp.,* 588 F.2d 880 (2d Cir. 1978); *Schertenleib* v. *Traum,* 589 F.2d 1156, 1164 (2d Cir. 1978); *Mizokami Bros. of Arizona, Inc.* v. *Baychem Corp.,* 556 F.2d 975 (9th Cir. 1977) (per curiam), *cert. denied,* 434 U.S. 1035 (1978); *Fitzgerald* v. *Texaco, Inc.,* 521 F.2d 448 (2d Cir. 1975), *cert, denied,* 423 U.S. 1052 (1976); *Paper Operations Consultants Int'l, Ltd.* v. *S.S. Hong Kong Amber,* 513 F.2d 667, 671 (9th Cir. 1975); *Frangiskatos* v. *Konkar Maritime Enterprises, S.A.,* 471 F.2d 714, 715 (2d Cir. 1972) (per curiam); *Yerostathis* v. *A. Luisi, Ltd.,* 380 F.2d 377, 378 (9th Cir. 1967); *Vanity Fair Mills* v. *T. Eaton Co.,* 234 F.2d 633, 645-46 (2d Cir.), *cert. denied,* 352 U.S. 913 (1956); *Accord, Abouchalache* v. *Hilton Int'l Co.,* 464 F. Supp. 94 (S.D.N.Y. 1978); *Texaco Trinidad, Inc.* v. *Astro Exito Navegacion S.A., Panama,* 437 F. Supp. 331 (S.D.N.Y. 1977).

4. For a comprehensive discussion of the evolution of the *forum non conveniens* doctrine, see *en banc* opinion beginning on page A-18 of the Petition.

5. The authority of United States federal courts to so decline jurisdiction has tended in the past to minimize the effect of forum-shopping generated by such international disparities in maritime law as those raised in the instant case. *See generally* Owen, *The Origins and Development of Marine Collision Law,* 51 Tulane L. Rev. 759, 806-07 (1977). Moreover, the doctrine of *forum non conveniens*

particularly apposite to the instant case, "a plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at the most inconvenient place for an adversary, even at some inconvenience to himself." *Gilbert,* 330 U.S. at 507.

But for the suggestion of petitioner in the instant case and the dissenting opinion of Judge Van Graafeiland in the *en banc* opinion of the Second Circuit that *Koster* v. *Lumbermen's Mutual Casualty Co.,* 330 U.S. 518, 524 (1947) states the rule, no alternative test or standard has been advanced for resolving *forum non conveniens* determinations. Moreover, respondent respectfully submits that *Koster* is but a pragmatic application of the *Gilbert* standard; not an exception to it.[6]

Indeed, petitioner seeks to disguise its real purpose by characterizing the result, and justifying need for review by

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has been applied most flexibly by the federal courts in admiralty cases. Bickel, *The Doctrine of Forum Non Conveniens As Applied In The Federal Courts In Matters Of Admiralty,* 35 Cornell L.Q. 12 (1949); *Braucher, supra,* at 920-921.

6. In *Koster,* decided on the same day as *Gilbert* and in a majority opinion written by the same judge, Mr. Justice Jackson, this Court affirmed the dismissal of a derivative action commenced in the Eastern District of New York by a New York plaintiff against Illinois defendants on grounds of *forum non conveniens.* In so doing, this Court observed:

> [P]laintiff should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. *Id.* at 524.

The factors weighed in *Koster* are precisely those announced in *Gilbert* which reflect the court's public interests concerns and the private interests of the parties. Moreover this Court in *Koster* stated "[corporate citizenship] might be entitled to little consideration under the doctrine of *forum non conveniens,* which resists formalization and looks to the realities that make for doing justice." *Id.* at 528.

the Court, in terms of a pendulum swung too far. But the *Gilbert* criteria, by design, keep all points in range of any just pendulum swing, requiring only a proper exercise by the district court of informed discretion. What petitioner seeks is not restoration of an appropriate flexibility but a return to rigidity; a result where there is no pendulum swing, no comparison or weighing of the objectives sought to be achieved by the *forum non conveniens* doctrine, but a rule of law favoring an American citizen's forum choice at a cost amounting to abandonment of the concept.

(A) The American Citizenship Of The Plaintiff Does Not Justify Creating A Special Rule Of *Forum Non Conveniens*.[7]

Neither this Court nor any federal court of appeals has held that a special rule of *forum non conveniens* other than *Gilbert* governs where, as here, the action is brought by an American citizen and there is an alternative forum abroad.

In *Swift & Co. Packers* v. *Compania Colombiana del Caribe, S.A.*, 339 U.S. 684, 697 (1950), this Court expressly refused to decide the question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens. Writing for a unanimous Court, Mr. Justice Frankfurter suggested, however, that such dismissal on *forum non conveniens* grounds in favor of litigation in a foreign forum would be proper if conditioned on an assurance that the respondent would appear in the alternative foreign forum and provide appropriate security. In the instant case, the dismissal was so conditioned and there is no dispute with respect to the conditions.

More significantly, in the two most recent circuit court cases dealing with this issue, the Second and Ninth circuits have applied the *Gilbert* standard in reviewing lower court dismissals on grounds of *forum non conveniens* where, as here, the plaintiff was an American citizen or one entitled

7. See the opinion *en banc* of the Second Circuit (Petition A-31).

to the rights of an American citizen. *Farmanfarmian* v. *Gulf Oil Corp.*, 588 F.2d 880 (2d Cir. 1978); *Mizokami Bros. of Arizona, Inc.* v. *Baychem Corp.*, 556 F.2d 975 (9th Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 1035 (1978).

In *Farmanfarmaian* v. *Gulf Oil Corp.*, 588 F.2d 880 (2d Cir. 1978), the Second Circuit affirmed the district court's dismissal of an action by an Iranian citizen, who under a bi-lateral treaty between the United States and Iran had "access to [this] country's courts on terms no less favorable than those applicable to nationals of the court's country," *id.* at 882, citing 8 United States Treaties and Other International Agreements 900, 902-03 (1957). In that case, the plaintiff commenced an action in the Southern District of New York against eleven American companies for breach of contract and tortious interference with contract rights. Recognizing that the district court "applied the same *forum non conveniens* standards as would be applied were the plaintiff an American citizen," *id.*, the court unanimously affirmed the dismissal in favor of litigation in the alternative foreign forum. A writ of certiorari was not sought.

Similarly, in *Mizokami Bros. of Arizona, Inc.* v. *Baychem Corp.*, 556 F.2d 975 (9th Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 1035 (1978), the Ninth Circuit upheld the lower court's dismissal of an action by an American plaintiff in favor of litigation in Mexican courts. There, a United States importer of Mexican produce sued a German corporation and its Mexican and American subsidiaries in federal district court for the District of Arizona to recover for loss arising from excessive chemical contamination to a produce shipment. Approving the district court's exercise of discretion under the Gilbert standard, the court affirmed the dismissal under the doctrine of *forum non conveniens*. In so deciding, the Ninth Circuit concluded:

> The plaintiff falls back on its United States citizenship as the sole and only basis for suing these defendants in a court of the United States. *This is*

> *not enough.* In an era of increasing international commerce, parties who choose to engage in international transactions should know that when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere. *Id.* at 978 (emphasis added).

While courts have expressed a "reluctance", *see, e.g., Vanity Fair Mills* v. *T. Eaton Co.,* 234 F.2d 633, 645 (2d Cir.), *cert. denied,* 352 U.S. 871 (1956), to dismiss an action brought by an American plaintiff under the doctrine of *forum non conveniens,* these courts have not adopted a standard different from *Gilbert;* they have merely required that the balancing of *Gilbert* factors strongly favor a more appropriate, convenient and less prejudicial forum.

Any contention that the holding of the *en banc* court below is inconsistent with decisions of the Third, Fifth, and District of Columbia Circuits has no merit; each of the cases relied upon by petitioner is factually distinguishable.

In *Mobil Tankers Company, S.A.* v. *Mene Grande Oil Co.,* 363 F.2d 611 (3d Cir.), *cert. denied,* 385 U.S. 945 (1966), the Third Circuit held improper the district court's dismissal of an American libelant on *forum non conveniens* grounds. In that case, as here, the court applied the *Gilbert* criteria in determining the motion to dismiss. There, however, unlike the instant case, the court concluded that the record was devoid of evidence that the retention of jurisdiction by the district court would seriously prejudice the defendant. *Id.* at 614-15. Here, the district court expressly concluded that:

> The lack of a substantial nexus between this controversy and the Southern District of New York combined with the inconvenience and possible prejudice to the defendant resulting from retention of jurisdiction here—which substantially outweigh any inconvenience plaintiff may suffer—renders this an inappropriate forum. . . . [Petition A-76].

> Most importantly, the inability to implead the Pilot Association here, which is not challenged by plaintiff, may *seriously prejudice* the defendant. . . . [Petition A-78] (emphasis added).

In *Mobil Tankers,* the relinquishment of jurisdiction would have relegated the libelants to a foreign forum in which the mode of trial, the lack of adequate pre-trial procedures, and a limitation on the manner in which expert testimony can be offered did not comport with American concepts of fairness. Here, in contrast, the petition raises no such question of fairness. [Petition A-29 n.16].

In *Burt* v. *Isthmus Development Co.,* 218 F.2d 353 (5th Cir.), *cert. denied,* 349 U.S. 922 (1955), the Fifth Circuit held improper the dismissal of a contract action by a New York plaintiff against a Texas corporation on a *forum non conveniens* basis since any inconvenience to the defendant was offset by factors *other than* the plaintiff's citizenship. *Id.* at 358. In so holding, the Fifth Circuit concluded that the defendant's incorporation in the forum state, the compounded disadvantage of inconvenience to the plaintiff, and the personal presence in the forum by a witness heavily relied upon by the defendant militated against dismissal. *Id.* None of these factors is present in the instant case. Further, the Fifth Circuit found unnecessary in that case "flatly to hold that no discretion exists in *any* . . . case [brought by a resident citizen] to decline jurisdiction." *Id.* at 357. Writing for the court, Judge Dawkins stated:

> Experience has taught that such a holding may prove unsound in extreme cases; and the Supreme Court in the *Swift* case . . . declined to pass upon a similar point. We leave that question open. *Id.* (citation omitted).

In *Founding Church of Scientology of Washington, D.C.* v. *Verlag, et al.,* 536 F.2d 429 (D.C. Cir. 1976), the Court of Appeals for the District of Columbia reversed a dis-

missal of a libel action by a District of Columbia corporation against a New York corporation. The District of Columbia Circuit held that the lower court abused its discretion under *Gilbert* in dismissing on *forum non conveniens* grounds based only upon a consideration of the drawbacks of one forum and not on a weighing of the relative advantages of each forum. The court there found it "of great significance" that, unlike the instant case, both the plaintiff and the defendant were residents of the United States and that the plaintiff sought damages for alleged tortious conduct *in the District of Columbia, i.e.,* the original forum. *Id.* at 435. That case, unlike here, presented "important questions . . . which will turn on evidence collected in the United States on questions which may be controlled by local law." *Id.* at 436 (citation omitted). There, unlike the instant case, many of the witnesses whom the plaintiff would be required to call were from the United States. *Id.*

In the instant case respondent respectfully submits that the district court, in the sound exercise of its discretion, properly applied the *Gilbert* criteria and did not err in conditionally dismissing the action as determined by the Second Circuit.

The facts of this case lead to the inescapable conclusion that this controversy lacks any substantial nexus to the Southern District of New York. Additionally, the respondent would be seriously prejudiced by its inability to implead here a party directly involved, the Trinidadian Pilots' Association, and by the absence here of compulsory process over Trinidadian fact witnesses required to properly defend this action on the issue of liability and damages. This possible serious prejudice combined with the inconvenience to respondent resulting from retention of jurisdiction, substantially outweigh any possible inconvenience to petitioner that would result from litigation in a forum where petitioner conducts business activities and with

which petitioner presumably is "not . . . unfamiliar." [Petition A-79].

Applying the *Gilbert* standard, recently several other judges in the Southern District of New York have dismissed actions by American citizens or residents on grounds of *forum non conveniens* in favor of litigation in a foreign forum.

In *Texaco Trinidad, Inc.* v. *Astro Exito Navegacion S.A.*, 437 F. Supp. 331 (S.D.N.Y. 1977), an admiralty case, the defendant's ship damaged the plaintiff's jetty while in the process of mooring in Trinidad. After the plaintiff, a United States corporation, sued the defendant, a Panamanian corporation, in the United States federal court, the defendant moved to dismiss on grounds of *forum non conveniens* in favor of trial in Trinidad. In that case, as here, the limitation of liability statute which likely would be applied by a court in Trinidad favored the defendant. There, as here, the plaintiff opposed the motion on the basis of its United States citizenship by incorporation and the unfavorable limitation law to which it would be subject in the foreign forum. Dismissing the action, the court concluded that the nature of the action was wholly local and observed that the plaintiff's United States citizenship by incorporation was merely a factor to be considered, and did not control "if the balance of factors tips heavily in favor of defendants." *Id.* at 333-34.

Similarly, in *Mohr* v. *Allen*, 407 F. Supp. 483 (S.D.N.Y. 1976), plaintiff, an American citizen, sued on the basis of a purported oral contract with a Mexican national to develop hotel property in Mexico. The court noted that Mexico was the clear locus of events and applied the *Gilbert* standard. Notwithstanding the American citizenship of the plaintiff, the court dismissed the action (conditionally) resting its decision on *forum non conveniens* as an alternate ground. (This Court is respectfully referred to the opinion *en banc* of the Second Circuit [Petition A-24].

(B) Significant Policy Considerations Support Adherence to a Uniform Standard For Determination Of *Forum Non Conveniens* Motions.

The recent decision by the Court of Appeals for the Second Circuit in *Farmanfarmaian,* 588 F.2d 880 (1978), supports adherence to the uniform standard of *Gilbert* as a matter of policy. The Treaties of Friendship, Commerce and Navigation, and similar agreements, maintained between the United States and many foreign nations include "no less favorable" treatment clauses like that found in the treaty addressed in *Farmanfarmaian. See,* Wilson, *Access-to-Courts Provisions in U.S. Commercial Treaties,* 47 Am. J.Intl. Law, 20, 45 (1953); 20 Harv. Int'l L. J., 404, 411 n.40 (1979) (relevant treaties summarized); Agreement on Trade Relations, Mar. 17, 1978, United States – Hungary, T.I.A.S. No. 8967; Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States – Belgium, 14 U.S.T. 1284, 1289; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1961, United States – Denmark, 12 U.S.T. 908, 912. Adoption of a more stringent *forum non conveniens standard* would give rise to new problems, as recognized by Judge Timbers, writing for the *en banc* majority below:

> The courts either would be obliged to apply this same vexation standard to foreign nationals who are the beneficiaries of such clauses, thus barring dismissal for all practical purposes and crippling the concept of forum non conveniens, or they would have to do violence to our treaty obligations which of course are paramount under the Constitution. [Petition A-15]

Moreover, fundamental fairness coupled with commercial reality mandates that foreign corporations be accorded equal treatment in United States courts. This Court in *M/S Bremen* v. *Zapata Off-Shore Co.,* 407 U.S. 1 (1972), an admiralty case, eschewed a parochial approach in the related area of enforcement of contractual choice-of-forum

clauses which send an American plaintiff to a foreign tribunal. Vacating the decision of the Fifth Circuit Court of Appeals *en banc,* this Court there upheld the validity of a contract forum—selection clause which required trial in England by an American plaintiff. There, this Court observed:

> We cannot have trade and commerce in world markets in international waters exclusively on our terms, governed by our laws and resolved in our courts. *Id.* at 9.

Adoption of the parochial approach urged by petitioner would confer upon multinational corporations, shopping for a favorable forum, the best of all possible worlds. Such corporations could move for dismisisal on the ground of *forum non conveniens*—as *Texaco* did in the landmark Second Circuit case of *Fitzgerald* v. *Texaco, Inc.,* 521 F.2d 448 (2d Cir. 1975), *cert. denied,* 423 U.S. 1052 (1976), and the oil companies did in *Farmanfarmaian* v. *Gulf Oil Corp.,* 588 F.2d 880 (2d Cir. 1978)—when they believe their interest will be best served by trial abroad and, of course, resist *forum non conveniens* on the grounds that they are an immune American citizen when they have chosen to bring suit in an American court not surprisingly also in furtherance of their own best interest.

To summarize, the petition for writ of certiorari should be denied thereby leaving undisturbed three decades of consistent decisions all of which apply the workable criteria of *Gilbert.*

POINT II

THE DISTRICT COURT HAS DISCRETION TO DISMISS UNDER THE DOCTRINE OF *FORUM NON CONVENIENS* NOTWITHSTANDING ANY PROSPECT OF A LESSER RECOVERY BY PLAINTIFF IN THE ALTERNATIVE FORUM.

The proper application of the doctrine of *forum non conveniens* is *not* dependent upon whether the alternative forum provides a more or a less favorable recovery.

Canada Malting Co. v. *Paterson Steamships, Ltd.*, 285 U.S. 413 (1932); *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); *cf. M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 8 n.8 (1972) [enforcing a contract forum selection clause, despite a lesser limitation fund in the alernative forum, England (*i.e.* slightly in excess of $80,000), than in the United States (*i.e.* $1,390,000)]. As recognized recently by the Court of Appeals for the Second Circuit in *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976):

> A district court has discretion to dismiss an action under the doctrine of *forum non conveniens*, however, *even though the law applicable in the alternative forum may be less favorable to the plaintiff's chance of recovery. Canada Malting Co., Ltd.* v. *Paterson Steamships*, 285 U.S. 413, 418-20, 52 S.Ct. 413, 76 L.Ed. 837 (1932). A contrary holding would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover. But the issue remains one of balancing the relevant factors, including the choice of law. (emphasis added).[8]

Adoption of another rule would encourage precisely the type of "transoceanic forum shopping" that the doctrine of *forum non conveniens* has been designed to prevent, *see Gilbert*, 330 U.S. at 507, and that has been criticized in recent years by this Court, *see United States* v. *Reliable Transfer*

8. Counsel for the petitioner misinterprets the meaning of the last phrase above. His interpretation ignores the essential holding of the court in *Fitzgerald*. Affirming dismissal of the action, the court there held that the possibility of a lesser recovery by the plaintiff in the alternative forum was outweighed by "the clear prejudice which defendants would suffer if jurisdiction were retained, together with considerations of public interest, and the factors of convenience . . . ." *Id.* at 453. Moreover, among the factors expressly considered by the court in *Fitzgerald* to weigh against the retention of jurisdiction in the Southern District of New York was, as here, the "inability to implead other parties directly involved in the controversy." *Id.* at 453.

Co., 421 U.S. 397, 404 (1975). Under United States statutes, the limitation fund comprises pending freight and the value of the vessel owner's interest in the vessel, measured after the casualty. 46 U.S.C. § 183. If the casualty here had resulted in total loss of the M/V NORDIC REGENT, since there would have been a virtual nil fund, it is more than fair to conclude that petitioner would have initiated litigation in Trinidad and certainly not in any United States court.

Any contention that the possibility of a lesser recovery by the petitioner in the alternative forum precludes *forum non conveniens* dismissal is without merit. In *Canada Malting Co., Ltd.* v. *Paterson Steamships, Ltd.*, 285 U.S. 413 (1932), this Court rejected such a contention in affirming the district court's decision to decline to exercise jurisdiction, despite the difference in Canadian and United States laws governing the extent of recovery for cargo damages. *See also Kloeckner Reederei Und Kohlenhandel G.M.B.H.* v. *A/S Hakedal (The Western Farmer)*, 210 F.2d 754, 756 (2d Cir. 1954), *appeal dismissed*, 348 U.S. 801 (1954), in which Judge Learned Hand characterized the difference in recovery as "irrelevant."

The language in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964), cited by petitioner, has no application to the instant case. In *Van Dusen*, the lower court's decision to transfer forty wrongful death actions under the federal transfer statute, 28 U.S.C. § 1404(a), was remanded for reconsideration with directions that transfer, if any, should be conditioned on the transferee district court applying the state law that would have been applied by the transferor district court, including the transferor court's choice of law rules. In that case, the Court specifically construed the narrow statutory language of § 1404(a) as a "federal judicial housekeeping measure dealing with the placement

of litigation in the federal courts and generally intended . . . simply to authorize a change of courtrooms." *Id.* at 637. This Court has never imposed such a restriction on the inherent authority of the federal district courts to dismiss, as in the instant maritime case, pursuant to the common law—or non-statutory—doctrine of *forum non conveniens*. *See Schertenleib* v. *Traum*, 589 F.2d 1156, 1166 (2d Cir. 1978). Indeed, this Court in *Van Dusen* expressly declined to extend its ruling to the issue in the instant case, and limited its decision to transfers sought by a defendant under § 1404(a):

> We do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee State. We do *not* attempt to determine whether . . . the same considerations would govern . . . if it was contended that the transferor State would simply have dismissed the action on the ground of *forum non conveniens*. 376 U.S. at 639-40 (footnotes omitted) (emphasis added).[9]

In any event, dismissal in the instant case is consistent with practical justice and results in no unfairness to petitioner by the prospect of recovering less than 3.5 million

9. *Van Dusen* is further distinguishable from the instant case to the extent any difference in recovery there turned on the application of conflicting state *substantive* law. Here, in contrast, any difference in recovery arises from the fact that we are dealing with two different limitation of liability statutes, which are considered procedural matters applied by each forum. *Cf. Oceanic Steam Navigation Co.* v. *Mellor (The Titanic)*, 233 U.S. 718 (1914); *Black Diamond S.S. Corp.* v. *Robert Stewart & Sons, Ltd. (The Norwalk Victory)*, 336 U.S. 386 (1949); *Kloeckner Und Kohlenhandel* v. *A/S Hakedal (The Western Farmer)*, 210 F.2d 754 (2d Cir. 1954), *appeal dismissed*, 348 U.S. 801 (1954). Even assuming arguendo that limitation of liability statutes were viewed as substantive, petitioner could take no comfort from the fact because under traditional conflicts of law principles the substantive law of Trinidad would be applied by the trial court thus making appropriate the lesser limitation. This perhaps, best demonstrates why petitioner shopped for an American forum in this case.

dollars in Trinidad.[10] As stated by the majority *en banc* below:

> [I]t is not at all unfair for [petitioner] to recover the lesser amount. Its pier was in Trinidad. It was not likely to go traveling. As long as it did not, Trinidad's damage limitation law governed. It would be unfair to impose an additional recovery against appellee when appellant, fully familiar with the law of the place where it maintained a permanent business, could have insured its additional risk in a prudent fashion. There is no reason to suppose that it has not done so. [Petition A-29].

Petitioner is neither left without a remedy nor remitted to an inadequate forum. There is no suggestion in the record that Trinidad's common law judicial system is devoid of due process. Further, dismissal does not deprive petitioner of security it otherwise would have had. Respondent has submitted to the jurisdiction of the Trinidad courts and has given a letter of guarantee that a judgment against it in Trinidad will be satisfied. (*Id.* at A-29).

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10. Petitioner contends that dismissal will result in its loss of almost $8,000,000. Respondent submits that this statement, coming from experienced maritime counsel, familiar with all the facts, is disingenuous. Both the district court and counsel were aware that the value of the vessel after the casualty was $3.5 million—the maximum amount of any limitation fund in an American court. Consequently, the difference between the amount of the limitation funds in the United States and Trinidad is not nearly as dramatic and suggested by petitioner. In this context, respondent's estimate of the cost of repair is only $1.5 million. It should also be pointed out that if petitioner proves that the shipowner had privity or knowledge of the negligence resulting in the casualty full damages are recovered in both jurisdictions under the respective limitation of liability statutes.

The references to $8 million in damages is both misleading and inconsistent with traditional notions of fair play. It should also be noted that petitioner unilaterally altered the official caption of this action on the cover and first page of its petition for writ of certiorari and likewise on each of its appellate briefs in the court below, adding parenthetical descriptions of the parties in furtherance of its parochial argument.

Conclusion

For the stated reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
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Respectfully submitted,

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